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IN THE
Supreme Court of the United States

MICHAEL GOLIGHTLY, JOE CARTER, W. HAYS GILSTRAP, JOE MELTON, SUE E. CHILTON, LINDA MELKER AND DUANE R. SHROUFE,

Petitioners,

v.

LAWRENCE MONTOYA, FILIBERTO VALERIO AND CAROLE JEAN TAULMAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES IN SUPPORT OF PETITIONERS

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The International Association of Fish and Wildlife Agencies, having obtained written consent of all parties to the case as provided by Sup. Ct. Rule 37.2(a), submits this brief in support of petitioners.

INTEREST OF *AMICUS CURIAE*[*]

The International Association of Fish and Wildlife Agencies ("the Association") is a District of Columbia not-for-profit corporation with offices in the Hall of the States

[*] Counsel of record for petitioner has for many years served as legal counsel to amicus curiae and to individual member state wildlife agencies of the Association and authored the instant brief in substantial part. Sup. Ct. Rule 36.7.

Building, 444 North Capitol Street, N.W., Washington, D.C. Founded at Yellowstone National Park on July 20, 1902, by representatives of six state fish and game departments, the Association now numbers among its government members the fish and wildlife agencies of all fifty states. For one hundred years, the purpose of the Association has been to coordinate the efforts of public administrative agencies responsible for the protection and management of the wildlife of North America.

The successful production and maintenance of big game animals depend on protecting the breeding stock and providing a suitable environment in terms of food, cover, predators, disease and parasites.[1] Given the wild nature (*ferae naturae*) of the resource, successful wildlife management depends heavily on the support of state residents and the assistance of volunteers. By subjecting to "strict scrutiny" analysis under the negative Commerce Clause Arizona's preference for residents in allocating permits for recreational hunting of big game species highly prized by hunters, the decision of the U.S. Court of Appeals for the Ninth Circuit strikes at the ability of states to maintain the level of local sacrifice and contribution necessary to produce big game, undermining not only the resident allocation preferences in Arizona and twenty-six other states, but also undermining the legality under the negative Commerce Clause of license fee differentials upheld by this Court in *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U.S. 371 (1978).

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[1] *Report of the Committee on American Wild Life Policy*, Aldo Leopold, Chairman, Presented at the 16th American Game Conference, December 3, 1929, BULLETIN OF THE AMERICAN GAME PROTECTIVE ASSOCIATION 13 (December 1929-January 1930)(hereinafter "*Leopold Report*").

INTRODUCTION:
Commercial Hunting Prior to the Era of State Regulation

The meat of wild game was an important part of the early American economy and remained so for three centuries. William Bradford recorded that, in the early years before livestock arrived in Plymouth, men were assigned to hunt deer, turkeys and waterfowl to meet the protein needs of the colonists.[2]

When the 49ers rushed in to California, market hunting emerged in response to the need for food, and the abundant wildlife of that state became fair game. Many miners turned their attention to killing deer, elk, bear, antelope, geese and ducks for sale in San Francisco. A sea bird called the murre nested on the Farallon Islands, several small islands just thirty miles from San Francisco. With fresh eggs selling in the mining camps for two dollars a single egg, the Farallon Egg Company established a record by removing in two days over 120,000 murre eggs. Not surprisingly, the murre was nearly extirpated.[3] In like manner, the Merriam elk, once found in large numbers in eastern Arizona before the arrival of settlers in the 1870s, was hunted commercially for its meat, hides and ivories before being extirpated in the Territory in 1898. Exhibits A, B, Defendants' Statement of Material Facts.

Before 1820, millions of prairie buffalo roaming the western grasslands outnumbered Indian and white hunters by several thousand to one. But buffalo hides and robes brought a price per pound nearly as high as the better meat cuts. Once the railroads penetrated the prairies the annual buffalo kill

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[2] JAMES B. TREFETHEN, AN AMERICAN CRUSADE FOR WILDLIFE 55 (1975).

[3] Oakland Museum of California, Market Hunting (visited Dec. 2, 2002) http://www.museumca.org/goldrush/fever.

climbed steadily until it crested at nearly five million in 1871. After 1873, only scattered bands of buffalo remained south of the Platte River, too few to support commercial hunting, and the million or so buffalo north of the Platte, in Dakota Territory, Idaho, Montana and Wyoming, met the same fate when the buffalo hunters turned their attention north. By 1889, a small herd of mountain buffalo in Yellowstone National Park was virtually the sole representative of the millions of buffalo that had once roamed the west.[4]

Venison, wild fowl and other game were staples in the cuisine of most American homes throughout the 1800s. Selling game to the railroads for transportation to urban centers was so profitable that many boys and young men abandoned jobs and school to take up commercial hunting. By 1850 the heath hen, a subspecies of the greater prairie chicken, was confined almost entirely to Martha's Vineyard after being extirpated from Long Island, New Jersey and Pennsylvania by market hunters.[5] In 1904, the Bureau of Labor Statistics recorded the sale in Missouri of 3,999,516 pounds of game. Both fish and game were gathered in wholesale lots and shipped to cold storage warehouses in eastern cities, hastening the decline in Missouri of deer, turkey, ruffed grouse and prairie chicken.

Concentrated flocks made the passenger pigeon a profitable target for the market hunter. Audubon, in the autumn of 1813, described a dense passenger pigeon roost near the Ohio River that he estimated to average three miles in width. Throughout the forest as birds poured in, Audubon wrote, one could hear trees and limbs crashing to earth under the weight of swarming birds. But dense concentrations in the migration, feeding, nesting and roosting areas could be readily identified

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4 TREFETHEN, *supra* note 2, at 13-17.

5 *See id.* at 61-62.

by market netters and were thus made to order for exploitation. Around the edges of roosts, nesting colonies or feeding fields, professional "pigeoners" erected heavily baited drop or clap nets capable of taking hundreds of birds at a time. In 1878, the last great nesting colony was discovered near Petoskey, Michigan, and twenty-five hundred pigeoners with nets descended upon it. Within the space of a few weeks over a billion birds had been shipped to market, an event marking the end of the passenger pigeon as a viable species. A few scattered flocks persisted until after the turn of the century, the last known survivor of the species dying in the Cincinnati Zoological Garden in September 1914.[6]

Market hunters operated by the hundreds on Chesapeake Bay, working six days a week from dusk to dawn and, in the case of punt gunners, much of the night. The punt gun, which made its appearance early in the nineteenth century, was essentially a light cannon with a bore of from 1¼ to 2 inches in diameter capable of throwing up to a pound of shot. In use, it was mounted on a low-sided shallow-draft boat, equipped with a large light on the bow and with ropes to hold the gun in place to absorb the enormous recoil. As night fell, the gunner paddled silently to the edge of a feeding flock of birds and pulled the lanyard as the birds began to take alarm. The resulting shot cut a swath up to eight feet wide and a hundred yards long, and the killing of over a hundred ducks or geese with a single shot was common.[7]

Wherever game was commercialized, its fate was sealed. Striving always toward that which is more economic, commercial hunters organized their means and methods of take in whatever way would provide the greatest number of kills with the least amount of effort.

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[6] *See id.* at 63-65.

[7] *See id.* at 60.

SUMMARY OF ARGUMENT

Commercial hunting of big game is characterized by the absence of restriction: no bag limits, no closed seasons, and no prohibition on the sale of meat. No state permits the commercialization of big game animals. Regulation of big game hunting in Arizona, typical of such regulation in other states, establishes strict bag limits, short open seasons and restrictions on means and methods of take. Arizona's bag limit of one bull elk or one antlered deer north of the Kaibab and its prohibition on sale of meat are incompatible with hunting of big game for profit.

In coastal states where both a commercial fishery and a recreational fishery exist for the same species of food fish and shellfish, the two fisheries are distinguished by type of gear employed, not by the motives of individual fishermen such as the court of appeals found decisive in determining that respondents seek to hunt elk and antlered deer for a commercial purpose.

In describing Arizona's ten percent cap on allocation of nonresident permits for bull elk and antlered elk in the north Kaibab, the court of appeals repeatedly refers to the state's "interest in maintaining recreational hunting opportunities for its citizens." *Montoya* v. *Manning*, 301 F.3d 985, 988, 996, 997, 999, 1000 (9th Cir. 2002). Yet the court of appeals implicates the negative Commerce Clause by finding that respondents desire to participate in Arizona's "recreational hunting opportunities" for a commercial purpose. If an individual's motives were decisive in determining his classification before the law, legislative classification could be readily defeated.

ARGUMENT

1. Commercial Hunting of Big Game Animals Is Prohibited in All States Through Regulation of Seasons, Bag Limits and Means and Methods of Take That Are Incompatible With Hunting for Profit.

The common features of market hunting of big game until the latter part of the nineteenth century were that no restrictions existed on the numbers that could be taken, on the seasons during which taking could occur except as nature dictated for migratory species, or on the means and methods that could be employed to kill wildlife. By late century, growing public reaction brought about state regulation that ended market hunting of big game. By 1910 every state had established a fish and game agency.[8] The prohibition of commercial hunting of big game animals was the central, if not the constitutive, purpose for the establishment of such agencies. The commercialization of big game is now prohibited in all states.

While no state permits the commercialization of big game, no state statute declares that commercial hunting of big game is unlawful. This derives ultimately from an insight articulated by Blackstone: "For as no temporal tribunal can search the heart or fathom the intentions of the mind, otherwise than that they are demonstrated by outward actions, it therefore can not punish for what it can not know."[9]

Instead of prohibiting the commercialization of game as such, state legislatures and state fish and game agencies deal with objective "outward actions," rather than addressing an attitude of mind, by establishing seasons, bag limits, and restrictions on means and methods of take that are incompatible with hunting for profit. Aldo Leopold, the father of modern

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[8] TREFETHEN, *supra* note 2, at 157.

[9] 4 WILLIAM BLACKSTONE, COMMENTARIES 21.

game management, observed that in Europe the right to shoot game vested in the ownership of land and could be sold or let: "The game itself is commercialized, and *hence* there are no bag limits, few restrictions as to season, and none as to sale of meat." (Emphasis added.)[10]

Primary authority and responsibility for protection and management of elk and deer in Arizona reside in the state which is deemed to hold these species in trust for the benefit of present and future generations of the people of Arizona. Except on privately owned game farms, lawful in some states, no state permits the commercialization of big game because applicable statutory and regulatory restrictions are incompatible with hunting of big game for profit.

Arizona is typical of other states in establishing seasons and bag limits and restricting means and methods of take of big game animals.[11] In the case of bull elk and antlered deer north of the Colorado River, the bag limit is one animal per year if an individual is successful in the random draw made necessary by the high demand for hunting certain species in certain Arizona management units. As stated by the court of appeals, "The part of Arizona north of the Colorado River, called the 'North Kaibab' and 'Arizona strip,' is a particularly scenic area known for its trophy elk and deer populations and is accordingly a location favored by hunters." 301 F.3d at 988-989.

In addition to a bag limit of one animal, the 1999 season for antlered deer north of the Colorado River extended for twenty days in one area of the Kaibab and twenty-six days in the other, while the 1999 early bull elk season and the later bull elk season were open for a total of no more than thirteen days

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10 *Leopold Report* at 16.

11 "Big game" in Arizona is defined by statute as wild turkey, deer, elk, antelope, bighorn sheep, bison (buffalo), peccary (javelina), bear and mountain lion. ARIZ. REV. STAT. ANN. § 17-101(B)(3)(Supp. 2002).

in each management unit. 1999-2000 ARIZONA HUNTING REGULATIONS 29, 36. Moreover, it is unlawful in Arizona to take, possess, transport, buy, sell, offer for sale or expose for sale wildlife except as expressly permitted by title 17 of the state code which does not permit the sale of edible parts of wildlife. ARIZ. REV. STAT. ANN. § 17-309(A)(2)(Supp. 2002). It is unlawful to take wildlife during the closed season, to take wildlife in an area closed to the taking of that wildlife, to take wildlife with an unlawful device or by an unlawful method, to take wildlife in excess of the bag limit, to possess wildlife in excess of the possession limit, to possess or transport any wildlife or parts of wildlife unlawfully taken or to possess or transport the carcass of big game without a valid tag being attached. *See id.* § 17-309(11)-(18).

Wildlife may be taken in Arizona only during daylight hours and may not be taken with the aid of a jacklight or other artificial light. It is also prohibited to discharge a firearm or shoot any other device from a motor vehicle, including an automobile, aircraft, train or powerboat, or from a sailboat, boat under sail, or a floating object towed by a powerboat. *See id.* § 17-301(A),(B). In sum, Arizona's restrictions are incompatible with the commercialization of big game and objectively limit the field to recreational hunters.

2. The Use of Gear Types Employed in Harvesting Food Fish and Shellfish in the Waters of Coastal States Is Commonly a Surrogate in Distinguishing Commercial and Recreational Harvest, an Approach Consistent with the Recreational Nature of Big Game Hunting in Arizona.

As stated above, no state permits the commercialization of big game animals held in trust for the people. However, food fish and shellfish are the subject of both commercial fishing in the waters of most coastal states and the subject of recreational

harvest. Instead of distinguishing between recreational harvest and commercial harvest on the basis of a fisherman's professed intent, coastal states commonly distinguish the two fisheries by the type of gear employed.

South Carolina lists gear types that may be used in salt waters of the state for recreational purposes without being commercially licensed. S.C. CODE ANN. § 50-5-330 (Supp. 2001). Georgia defines "commercial fishing" to include "fishing with commercial fishing gear." GA. CODE ANN. § 27-1-2(16) (2001). In the waters of Massachusetts, a person setting out more than ten lobster pots (traps) must be commercially licensed to harvest lobster, MASS. GEN. LAWS ANN. §130-38 (2002), whereas the limit per vessel in the commercial lobster fishery is 800 pots per vessel.[12] Oregon defines "angle" to mean "to take or attempt to take a fish for personal use by means involving hook and line," while the term "commercial purposes" in relation to fishing is defined in the alternative as "taking food fish with any gear unlawful for angling or taking in excess of the limits for personal use or fishing for profit." OR. REV. STAT. §§ 496.004, 506.006(4)(1994).[13]

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[12] Arts. 3.3.1.1, 3.3.2.1, 3.3.7.1, AMENDMENT 3 TO THE INTERSTATE FISHERY MANAGEMENT PLAN FOR AMERICAN LOBSTER, FISHERY MANAGEMENT REPORT NO. 29, ATLANTIC STATES MARINE FISHERIES COMM'N (December 1997), implemented by the member states of the Atlantic States Marine Fisheries Commission, an interstate compact approved by Congress.

[13] Other coastal states adopt the same approach in differentiating commercial fishing from recreational fishing by gear type employed. E.g., CAL. Fish & GAME CODE § 7256 (1998); CONN. GEN'L STAT. ANN. §26-142a (1999); DEL. CODE ANN. 7-915 (Supp. 2000); FLA. STAT. ANN. § 370.06(2)(a) (Supp. 2003); N.C. GEN. STAT. § 113-168 (2002); N.Y. ENVIRONMENTAL CONS. LAW § 13-0329(1)(Supp.2003); VA. CODE ANN. § 28.2-226, 226.1 (2001).

In coastal states, therefore, where both commercial and recreational fisheries exist for the same species and it becomes necessary to distinguish the two fisheries, the use of gear likely to produce a non-commercial harvest (e.g., by hook and line or by setting out no more than ten lobster pots) as contrasted with gear capable of producing a commercial harvest marks the dividing line. It would be highly impractical to make such a distinction turn on whether a fisherman entertained a commercial or a recreational purpose.

3. The Desire of an Individual Hunter to Sell Nonedible Parts of Lawfully Taken Game Does Not Transform Recreational Hunting into a Commercial Undertaking.

While no such finding of fact was made by the district court, the court of appeals, perhaps to bring the case nominally within this Court's negative Commerce Clause jurisprudence, entered its own finding of fact that respondents' attempt to participate in recreational hunting in Arizona was, owing to their professed purpose, an attempt to engage in a commercial pursuit. According to the court of appeals, "Each plaintiff is a professional hunter and guide residing in New Mexico who applies for hunting tags around the country in order to obtain the meat of the animals, their hide, their ivories, and especially their head and rack of antlers to profit from the sale and use of the nonedible parts." 301 F.3d at 990. Arizona, according to the court of appeals, disadvantages nonresidents hunters "who seek to engage in this commercial pursuit," thereby burdening interstate commerce at its point of supply. 301 F.3d at 994.

While deeming respondents' attempted participation in the hunt to be commercial in nature, the court of appeals stated repeatedly that Arizona "has legitimate interests in conserving its population of game and maintaining recreational opportunities for its citizens." 301 F.3d at 988, 996, 997, 999, 1000. This ambivalence as to the nature of the activity being

regulated by the state — whether recreation or commerce — is resolved by the court of appeals on the basis of respondents' professed intent, viz., the hunt is commercial if respondents engage in a recreational hunt for a commercial purpose.[14] That is contrary to all state practice and, as a matter of principle, it is inadmissible that a person's motives determine his classification before the law else such radical individualism would defeat legislative classification.

Arizona, like all other states, addresses the matter on an objective basis through intensive regulation of the taking of big game by season closure except for a few days each year, by limiting legal take to one bull elk or antlered deer north of the Colorado during a year, by prohibiting the sale of edible parts of big game, and by establishing extensive limits on means and methods of take. Arizona permits the sale of nonedible parts of big game, a practice also common in most states, because it does not operate to commercialize game. No one, we think, would take the position that the waterfowl hunter is engaged in a commercial undertaking or a means to his livelihood because the U.S. Fish and Wildlife Service permits the sale of feathers of lawfully taken migratory waterfowl for the making of fishing flies, bed pillows, mattresses or similar commercial uses. 50 C.F.R. § 20.91.

Permitting or prohibiting the sale of nonedible parts of lawfully taken big game is not a substantial feature or condition

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[14] We are reminded of an observation by Judge Lucero in a recent decision from the Tenth Circuit upholding the disallowance by the Commissioner of Internal Revenue of losses incurred by taxpayer through his participation in a derivatives market program, transactions which the Commissioner determined to lack economic substance and not to have been entered into primarily for profit. As Judge Lucero observed, "The trading program we examine provided hefty opportunities for tax savings but only illusory opportunities for economic profit." Keeler v. Commissioner of Internal Revenue, 243 F.3d 1212, 1214 (10th Cir. 2001).

of big game hunting in Arizona or in any other state. If sale of nonedible parts were prohibited, it is fair to say that applications for permits to hunt bull elk and antlered deer would continue to pour in to the state. For that reason, it would be a simple matter for the Arizona legislature to avoid the strictures of the negative Commerce Clause, as understood by the court of appeals, by simply prohibiting sale of nonedible parts. That is where the decision of the court of appeals leads, however unseemly that the negative Commerce Clause, a fundamental feature of the federal-state division in our constitutional design, should be turned on or off like a spigot by the presence or absence of an inessential element of big game hunting.

CONCLUSION

For the reasons set forth, the petition should be granted.

Respectfully submitted,

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